THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SCOTT JOHNSON, et al. Plaintiff, v. JUSTIN SMITH, DVM, in his official capacity as Animal Health Commissioner at the Kansas Department of Agriculture Defendants.	Case No. 6:22-cv-1243-KHV-ADM

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant does not dispute that Scott Johnson is exactly the kind of person that Kansans want running a boarding or training kennel in this state. But Plaintiffs' regular compliance with the Pet Animal Act does not render the Act, or its inspection process, unnecessary. Unfortunately, not all licensees are so upstanding or experienced. The Pet Animal Act, and its implementing regulations, were enacted to ensure that all licensees—not just Plaintiffs—comply with the Pet Animal Act. The inspections, and their attendant element of surprise, further the state's legitimate interest in preventing animal abuse, neglect, and cruelty, and ensuring that the public can rest assured that licensed boarding or training kennels will take care of their beloved pets.

This is a legitimate public interest that is furthered by Defendant's necessary inspection regime. As set forth herein and in Defendant's motion for summary judgment, boarding or training kennels are closely regulated, and inspections of such kennels comply with the *Burger* criteria. And so, routine and follow up inspections of boarding or training kennels are reasonable and constitutional.

Defendant's motion for summary judgment should be granted, and Plaintiffs' motion for summary judgment should be denied.

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

The following facts contained in Plaintiffs' Statement of Facts ("PSOF"), for purposes of this motion, are neither controverted nor require additional response or context: PSOF 1-35, 37-40, 42-52, 54-59, 64-68, 70-73, 75, 77-107, 109-141, 143-166, 168-198, 202-246. Defendants respond to the remaining PSOFs below.

PSOF 36: Uncontroverted that inspectors look for violations during an inspection. Defendant would also note that inspectors are also focused on prevention and education of -licensees through inspections. (Doc. 89-28, 177:10-18; Doc. 89-26, 207:18–208:5).

PSOF 41: This statement of fact is misleading and suggests that inspectors are able to go into the home, kitchen, pantry, or shed of any licensee. That is not the case. An inspector can enter a licensee's home, kitchen, pantry, etc., only if the licensee uses those areas as a boarding or training kennel. But a licensee is only entitled to enter areas used as a licensed facility, in which the licensee has a reduced expectation of privacy. (Ex. B, 70:19-71:1; Doc. 89-26, 60:16–61:12).

PSOF 53: The violations in the AFI Manual track with the Pet Animal Act's implementing regulations, which are specifically authorized by statute. *See* Section 9, Article 18 of the Kansas Administrative Regulations; *see also* K.S.A. 47-1709(c),(e).

PSOF 60: Routine inspections are not allowed outside of the inspection windows, and Plaintiffs have produced no evidence of any routine inspections ever occurring outside of the inspection windows. If there's an inspection outside of that window, it is under the non-routine circumstances, such as a re-inspection or a complaint inspections which are specifically allowed for via regulation, can take place outside of the inspection window. K.A.R. § 9-18-9(c). Dr. Thomason

has never directed an inspector to perform a routine inspection outside of the licensee's inspection window, and is not aware of that ever having been done prior to her tenure as AFI Program Director. (Ex. A, 176:17–177:1).

PSOF 61: The cited materials do not support this assertion. Nothing in the cited testimony indicates that the AFI Program Director can override the inspection windows. Dr. Thomason has never directed an inspector to perform a routine inspection outside of the licensee's inspection window, and is not aware of that ever having been done prior to her tenure as AFI Program Director. (Ex A, 176:17–177:1).

PSOFs 62-63: Demel testified about status checks as something that he believed could be done. In practice, there is no evidence of any such status checks being performed. Dr. Thomason has never directed an inspector to perform a routine inspection outside of the licensee's inspection window and is not aware of that ever having been done prior to her tenure as AFI Program Director. (Ex. A, 176:17–177:1). The only other inspections allowed are set forth in K.A.R. 9-18-9(c).

PSOF 69, 76: There is no evidence that any person has ever had their license revoked for a single, no-contact event. Dr. Thomason testified that a single no-contact event is not grounds for revocation action. (Ex. A, 149:16–150:6). Defendant is not at all as arbitrary and capricious as this fact would suggest: a license can only be revoked pursuant to statute and can only be done subject to notice, an opportunity to be heard, and judicial review. *See* K.S.A. 47-1706.

PSOF 74: This statement of fact is misleading. An inspector has no right, or reason, to enter a licensee's home if that licensee's home is not a licensed facility. PSOF 74 is only true if the "home," is also a licensed facility. Indeed, the question that was asked in the cited materials was about "a licensed breeder [that] has a litter of dogs in their living room." (Ex. C, 66:6-13).

PSOF 108: This statement of fact is controverted by Plaintiffs' other statements of fact; specifically, PSOFs 11 and 240.

PSOF 142: The cited materials do not support this assertion. Demel specifically testified that some surface violations could be quickly remedied. (Doc. 89-26, 196:2–8).

PSOF 167: The cited materials say nothing about a physical issue with a kennel. Dr. Smith merely testified that if an inspector sees a dog with a health issue, Defendant will insist that the dog be seen quickly by a veterinarian. (Doc. 87-14, 48:3-18).

PSOF 199: This is uncontroverted, but is irrelevant, as the Defendant is not interested only in catching instances of dehydration only after the problem has become significant and chronic. A dog can succumb to life-threatening heat stroke in as little as 30 minutes during extreme heat. (Doc. 89-25, ¶ 17).

PSOF 200: This is uncontroverted with regard to a kennel like Plaintiffs', which keeps the same dogs for an extended period of time. This would not be true for a "doggie daycare" in which dogs are regularly coming and going from the facility. (Doc. 89-27, 55:9-21; Doc. 89-26, 73:7-10; Doc. 89-25, ¶ 8).

DEFENDANT'S STATEMENT OF ADDITIONAL MATERIAL FACTS ("DSOF")

DSOF 1. Dr. Thomason is a licensed veterinarian with a master's in public health training. (Doc. 89-25, ¶ 1).

DSOF 2. Dr. Thomason has been the AFI Program Director since January 2022. (Doc. 89-28, 7:2-11).

DSOF 3. Prior to serving as AFI Program Director, Dr. Thomason worked for two and a half years as a small animal consultant veterinarian for the Kansas State University Veterinary Diagnostic Lab. (Doc. 89-28, 8:21–9:2).

DSOF 4. For the 17 years before working as a small animal consultant K-State, Dr. Thomason worked as a small animal emergency medical veterinarian. In that role, she treated sick and injured animals in an emergency room setting. (Doc. 89-28, 9:14-24).

DSOF 5. For the first 11 of those 17 years, Dr. Thomason was in private practice. For the last 6 of those 17 years, she ran the small animal emergency service department for K-State's veterinary teaching hospital, while also teaching fourth-year veterinary students. (Doc.89-28, 10:12-22).

DSOF 6. The AFI Program currently employs three inspectors: Christopher Demel, Sara Washee, and Ben Lancaster. They are responsible for conducting routine inspections of facilities that are licensed under the Pet Animal Act, K.S.A. 47-1701, *et seq.* (*Id.* at 2(a)(vi)-(vii)).

DSOF 7. There are eight categories of facilities that the AFI program licenses and inspects. In addition to boarding or training kennels, there are animal distributors, K.S.A. 47-1702, pet shop operators, K.S.A. 47-1703, pounds or animal shelters, K.S.A. 47-1704, hobby breeders, K.S.A. 47-1719, research facilities, K.S.A. 47-1720, animal breeders, K.S.A. 47-1733, and retail breeders, K.S.A. 47-1736.

DSOF 8. The key factor that distinguishes boarding or training kennels from the other categories is that boarding or training kennels house pets that are owned and claimed by others. (*Compare* K.S.A. 47-1701(p) *with* K.S.A 47-1701(f),(g), (t),(aa),(m),(w),(gg); *see also* Doc. 89-25, at ¶ 7).

DSOF 9. Kansas started regulating boarding or training kennels in 1991. (Doc. 82 at 2(a)(xlv)).

DSOF 10. The application for a boarding or training license puts applicants on notice that their property will be subject to inspections under the Pet Animal Act. (Doc. 82 at 2(a)(xlvi)).

DSOF 11. A boarding or training kennel operator is defined by statute as "any person who operates an establishment where four or more dogs or cats, or both, are maintained in any one week during the license year for boarding, training or similar purposes for a fee or compensation." K.S.A. 47-1701(p).

DSOF 12. And so, the umbrella of boarding or training kennels covers hunting dog trainers, like Plaintiff, who may board dogs over an extended period of time in order to train them as bird hunting dogs. (Doc. 82, at 2(a)(xv)-(xxiv)).

DSOF 13. The umbrella of boarding or training kennels also covers "dog hotels" or "dog daycares," at which pet owners will have their dogs boarded at a facility for a shorter period of time while they are traveling or otherwise occupied. (Doc.89-27, 55:9-21; Doc. 89-26, 73:7-10; Doc. 89-25, ¶ 8).

DSOF 14. In March 2022, there were 189 licensed boarding or training kennels in Kansas. (Doc. 89-1).

DSOF 15. By September 2023, there were 198 licensed boarding or training kennels in Kansas. (Doc. 89-2).

DSOF 16. In September 2024, there were 214 licensed boarding or training kennels in Kansas. (Doc. 89-3).

DSOF 17. And so, the number of licensed and boarding training kennels has steadily increased in Kansas over recent years. (Docs. 89-1, 89-2, 89-3).

DSOF 18. This growth in boarding and training kennels is consistent with Dr. Thomason's observations during her time both as a clinician and the AFI Director. She has observed a "huge change" in how people value and treat their animals. More dogs live in the home, and pet owners often think of them as same level that parents think of children. (Doc. 89-28, 67:6-21).

DSOF 19. It is now very common for these dogs to live in the home with their owners, lie on the couch with their owners, sleep in the same bed with their owners, and lick the faces of their owners, all of which increases the likelihood of spreading disease to humans. (Doc. 89-25, ¶ 20).

DSOF 20. As Dr. Thomason notes, when she first started as a veterinarian, only a handful of pet owners were willing to invest in medical care for their dogs, and even then, would rarely spend more than $200.00. (Doc. 89-28, 68:1-4).

DSOF 21. In more recent years, she saw several people a day willing to pay around $6,000 for treatment to keep their dogs alive longer. (Doc. 89-28, 68:4-14).

DSOF 22. The increased prevalence of boarding and training kennels is consistent with this change in attitudes. There is an increased demand from pet owners for boarding or training kennels at which to leave their dog while they are away. (Doc. 89-28, 68:15-25).

DSOF 23. Dr. Thomason remarked that people used to board their animals at their veterinarian's when they went on vacation; now, there are more privately owned boarders due to a surge in demand. (Doc. 89-28, 68:19-25).

DSOF 24. Facilities that are licensed under the AFI program are subject to routine inspections. AFI Inspectors do not need a warrant to conduct these inspections. (Doc. 82 at 2(a)(xxxi)).

DSOF 25. K.S.A. 47-1709(b) provides that such inspections be made "at reasonable times, with the owner or owner's representative present."

DSOF 26. The frequency with which a facility will be subject to inspection is dependent on the results of previous inspections. An inspection will be conducted every 15 to 24 months if the premises passed its three most recent inspections; every 9 to 18 months if it passed its two most recent

inspections; and every 3 to 12 months if it failed either of its two most recent inspections. K.A.R. § 9-18-9(b); (Doc. 82 at 2(a)(xlvii)).

DSOF 27. Additionally, a facility may be subject to an additional, follow up inspection if: (1) A violation was found in a previous inspection; (2) A complaint is filed regarding the premises; (3) The ownership of the premises changed in the previous year; (4) The license for the premises was not renewed in a timely manner. K.A.R. § 9-18-9(c).

DSOF 28. For convenience of the owners or operators of licensed facilities, the Kansas regulations allow a licensee to identify a "designated representative," to be present for inspections if the owner or operator is not routinely available. K.A.R. § 9-18-9(e).

DSOF 29. Routine inspections can only be made on Monday through Friday, between 7:00 a.m. and 7:00 p.m., unless all persons involved in the inspection agree otherwise. K.A.R. § 9-18-9(d).

DSOF 30. The AFI Program Director drafts a Policy and Procedure Manual ("P&P Manual") that provides guidance and direction for the AFI Inspection Program. (Doc. 89-28, 15:20–18:25).

DSOF 31. The P&P Manual identifies the type of violations that AFI Inspectors are to look for when inspecting a facility. (Doc. 89-4).

DSOF 32. When conducting an inspection, inspectors inspect areas where the licensee keeps the animals in question, or where the licensee stores or preps food for the animals. (Doc. 89-26, 60:22-61:12); K.A.R. § 9-18-8.

DSOF 33. Inspectors are also allowed to inspect areas where records are kept, pursuant to K.A.R. § 9-18-7 and K.A.R. § 9-18-8(b); (Doc. 89-26, 62:19-22).

DSOF 34. The process for routine inspections is laid out clearly in the P&P Manual. (Doc. 89-4).

DSOF 35. Inspectors are tasked with looking for specific violations that are tied to relevant regulations. (*Compare* Doc. 89-4 *with* Section 9, Article 18 of the Kansas Administrative Regulations).

DSOF 36. When violations are found, inspectors assign a correction date by which the violation or issue should be corrected. (Doc. 89-4).

DSOF 37. Dr. Thomason testified that the inspections are primarily concerned with prevention and maintaining compliance with the regulations governing licensees. (Doc. 89-28, 177:10-18).

DSOF 38. To further that aim, Dr. Thomason noted that an element of surprise is important to keep licensees "on their toes," and that a licensee's compliance may temporary, and timed around a routine inspection, if advanced notice were given. (Doc. 89-28, 128:21-22, 177:9-18).

DSOF 39. According to Dr. Thomason, unlicensed, or poorly managed boarding or training facilities carry significant risks to animals, including dehydration, malnourishment, or other animal abuse or neglect. (Doc. 89-25, ¶ 11).

DSOF 40. Violations that appear minor, such as those related to food and trash storage, can have serious downstream impacts. Those violations are meant to prevent vermin infestation or food spoilage, both of which contribute to the spread of disease. (Doc. 89-25, ¶ 12).

DSOF 41. For example, mice carry multiple diseases that can also infect dogs and humans. These diseases include leptospirosis, salmonella, campylobacter, tularemia, or hantavirus. (Doc. 89-25, ¶ 13).

DSOF 42. When an infestation occurs at a pet animal facility, it allows the mice to have closer contact with the animals and, directly or indirectly, with the humans. This increases the chances of a disease being spread from the mice to the animals. (Doc. 89-25, ¶ 13).

DSOF 43. For most of the diseases listed above, direct contact with a mouse is not necessary for disease transmission. Contact with the mouse droppings can spread the disease. (Doc. 89-25, ¶ 13).

DSOF 44. Mice also transport disease-carrying ticks and fleas closer to dogs and humans, increasing the likelihood the ticks or fleas will move off the mouse onto a dog or human. ((Doc. 89-25, ¶ 13).

DSOF 45. Food that has spoiled allows bacteria and fungus to grow on it. When eaten, it can cause serious gastrointestinal upset such as inappetence, vomiting, and diarrhea. ((Doc. 89-25, ¶ 14).

DSOF 46. Fungi commonly produce toxins called mycotoxins that can cause illness ranging from gastrointestinal upset to liver toxicity to neurological symptoms such as seizures. (Doc. 89-25, ¶ 14).

DSOF 47. Contact with animal waste is the most common method of disease transmission for the following zoonotic diseases: intestinal parasites, coccidia, giardia, and leptospirosis. (Doc. 89-25, ¶ 15).

DSOF 48. Failure to properly clean up animal waste in a timely manner increases the chances that dogs (or humans) will come into contact with it and whatever disease-causing organisms that are in the fecal and urine waste. (Doc. 89-25, ¶ 15).

DSOF 49. Also, if regulations are not followed, dogs can be neglected, even to the point of being left out in extreme weather or without proper food or water. (Doc. 89-25, ¶ 16).

DSOF 50. During extreme cold or high temperatures plus high humidity, it can take as little as 30 minutes for a dog to succumb to life-threatening hypothermia or heat stroke. (Doc. 89-25, ¶ 17).

DSOF 51. During very hot, humid days, when dogs are not provided with access to water, they rapidly dehydrate which prevents them from being able to cool themselves, leading to heat stroke. Dogs can still succumb to heat stroke even if they have access to water, but not having water readily available for them to drink speeds up the process. (Doc. 89-25, ¶ 18).

DSOF 52. Dogs that live in the home with their owners, which is a temperature-controlled environment, are not acclimated to outdoor temperature extremes which makes them more susceptible to adverse reactions to extreme heat or cold than dogs that live strictly outdoors. (Doc. 89-25, ¶ 21).

DSOF 53. Because boarding and training kennels involve dogs mingling with other strange dogs, there is an increased risk of animal fights, accidental breeding, or the spread of disease. The diseases can then exit the kennel back into their owners' homes, where the diseases can spread even further. (Doc. 89-25, ¶ 19).

DSOF 54. Seventy-five percent of all emerging infectious diseases can be spread from animals to people. Over two-thirds of all currently known infectious diseases can be spread from animals to people. (Doc. 89-25, ¶ 22).

DSOF 55. When she practiced emergency medicine, one of the most common things Dr. Thomason treated was injuries from dog fights. (Doc. 89-25, ¶ 9).

DSOF 56. Some of these injuries can be quite severe, including extensive bite wounds that required anesthesia for cleaning, flushing, and drain placement; extensive life-threatening wounds

that required exploratory abdominal surgery to assess internal organ damage; wounds that punctured the chest cavity, causing respiratory distress and infection of the chest cavity; etc. (Doc. 89-25, ¶ 9).

DSOF 57. Dr. Thomason also had to euthanize dogs that were brought in after being mortally wounded in a dog fight to end suffering because they were injured so badly, there was nothing that could be done and death was imminent. (Doc. 89-25, ¶ 10).

DSOF 58. Inspector Chris Demel, who has been an AFI inspector since 2019, agreed that an element of surprise was necessary. He testified that it not only ensures compliance with the Pet Animal Act, but also, is necessary for the welfare of the animals. (Doc. 89-26, 7:5-12; 207:18–208:5).

DSOF 59. As Demel noted, unannounced inspections help not only with catching violations that impact animal welfare, but also, with seeing small issues that can be fixed before they become big problems. (Doc. 89-26, 208:1-5).

DSOF 60. Inspector Sara Washee, who has been an AFI inspector since 2022, also agreed that an element of surprise is important. (Doc. 89-27, 7:8–12; 177:8-11).

DSOF 61. Specifically, Washee noted that prior notice can give licensees "a chance" to move things or objects around, or hide issues, prior to the inspection. (Doc. 89-27, 177:12-23).

DSOF 62. According to Washee, an element of surprise helps ensure compliance, and a licensee is more likely to be in compliance at all times, "whether or not they know [she's] coming to do the inspection." (Doc. 89-27, 177:8-178:6).

DSOF 63. Demel identified several violations that could be easily concealed if a licensee had prior notice. For example, Demel noted that animal separation—which involves incompatible dogs being placed together—is a violation that can be easily remedied with notice by simply moving dogs. (Doc. 89-26, 188:13-22; 200:1–201:9); K.A.R. 9-18-15, 9-18-16.

DSOF 64. Demel testified that failure to separate intact male and female dogs carries a risk of unwanted pregnancy amongst pets. (Doc. 89-26, 200:21-23).

DSOF 65. In a similar vein, Demel testified that grouping two male dogs with one in-heat female can cause aggression issues and fighting amongst dogs, and would be easy to quickly remedy with notice by moving an animal. (Doc. 89-26, 201:4-12).

DSOF 66. Likewise, Demel testified that it would be easy to quickly conceal violations of the regulations relating to incompatible dogs, such as dogs who will not let other dogs eat or drink, if stored together. (Doc. 89-26, 201:21-202:14).

DSOF 67. Another concern identified by Demel was the grouping of diseased animals with healthy animals, which Demel also noted could be easily concealed by moving animals. (Doc.89-26, 202:15-23).

DSOF 68. Demel noted that the requirement that bedding be stored in a sealed contained with a tight-fitting lid could be easily concealable. (Doc. 89-26, 190:20-25); K.A.R. 9-18-10(e).

DSOF 69. Failure to have a contingency plan on hand is another violation the Demel testified could be easily concealed. (Doc. 89-26, 190:7-17); K.A.R. 9-18-18.

DSOF 70. Demel also identified numerous food storage violations that would be easy to quickly remedy with prior notice. (Doc. 89-26, 191:19–192:19); K.A.R. 9-18-10(e).

DSOF 71. Demel noted that food storage is important because food that is improperly stored can become contaminated with vermin urine or feces or can become moldy or rancid, in a way that would be harmful or cause disease to dogs that are boarded. (Doc. 89-26, 192:20–193:11).

DSOF 72. The regulation related to covering waste receptacles is another violation that Demel testified would be easily concealable. (Doc. 89-26, 195:8-17); K.A.R. 9-18-1(f).

DSOF 73. According to Demel, that regulation serves to prevent cross-contamination with dogs and reduce the prevalence of flies in a kennel. (Doc. 89-26, 195:8-22).

DSOF 74. Demel also identified regulations relating to a licensee utilizing chewed up or dirty bowls, which are more difficult to clean, and therefore, harbor dirt and bacteria, as a violation that would be easy to quickly remedy by quickly disposing of or changing out the bowl. (Doc. 89-26, 196:9–197:1, 197:20-198:6); K.A.R. 9-18-17(a)(2)(D).

DSOF 75. Likewise, Demel testified the violations of tethering regulations would be easily concealable with prior notice. (Doc. 89-26, 198:20-23; 199:18-20); K.A.R. 9-18-30.

DSOF 76. Demel further testified that regulations relating to the ratio of employees-to-animals would be easy to remedy with prior notice, because a licensee could try to bring in another employee or move animals around after getting notice of an inspection. (Doc. 89-26, 199:8-14).

DSOF 77. Demel also testified that a dog being left out in the extreme heat or extreme cold as being a violation that could be easily remedied with prior notice, simply by bringing the dog inside. (Doc. 89-26, 203:18–204:11); K.A.R. 9-18-12.

DSOF 78. Demel testified that a licensee could easily remedy issues with unclean water, if given prior notice. (Doc. 89-26, 204:18-25); K.A.R. 9-18-17(b).

DSOF 79. Demel also testified that, if enough notice were given, a licensee could even try to conceal extreme thirst or dehydration by constantly providing water to a dog prior to an inspection. (Doc. 89-26, 205:8–206:12).

DSOF 80. But Demel testified that given only 30 minutes' notice, "it would be hard" for a licensee to conceal extreme thirst in dogs. (Doc. 89-26, 206:13 – 16).

DSOF 81. AFI Inspectors have uncovered serious violations at boarding or training kennels. For example, in 2018, former AFI Inspector Elaine Adams conducted an inspection in

response to a complaint that a bulldog and two boxers were housed together, and the bulldog was found deceased. The cause of the death was unknown. (Doc. 89-5).

DSOF 82. When responding to that Complaint, Inspector Adams also saw that a Yorkiepoo dog had simply disappeared from the facility due to an inadequate housing and a lack of attentiveness by the kennel. (Doc. 89-5).

DSOF 83. On June 21, 2022, Inspector Washee conducted a routine inspection of a boarding or training kennel in which she found cats housed in neighboring kennels in close proximity to dogs. (Doc. 89-6).

DSOF 84. The kennel was cited for violations of K.A.R. 9-18-15, which requires that incompatible animals not be housed together. (Doc. 89-6).

DSOF 85. On August 4, 2022, Inspector Demel conducted an inspection in response to a complaint at a boarding or training kennel in which he found a significant buildup of dirt, grime, urine, and mice feces. (Doc. 89-7).

DSOF 86. At that same inspection, Inspector Demel also found that the kennel did not have a Veterinary Care Form. (Doc. 89-7).

DSOF 87. The Veterinary Care Form is a part of the Pet Animal Act's Requirement that kennels have a documented program of disease control and prevention, euthanasia, and routine veterinary care. K.S.A. 47-1701(dd)(1).

DSOF 88. On January April 12, 2023, AFI Inspector Washee conducted an inspection in response to a complaint at a boarding or training kennel. When she responded, there was only one employee tending to over 40 dogs. (Doc. 89-8).

DSOF 89. On March 20, 2023, Inspector Lancaster conducted an inspection or a boarding or training kennel in response to a complaint. The incident giving rise to the complaint

involved a 90 pound Great Pyrenes being kept in a play area with two small dogs—a 20 pound Goldendoodle and a 10-15 pound Shih Tzu. Although nobody saw what happened, it appeared that the larger dog attacked the smaller dogs, resulting in their deaths. (Doc. 89-9).

DSOF 90. The kennel was cited for a severity 5 violation of K.A.R. 9-18-15's requirement that incompatible dogs not be kept together. (Doc. 89-9).

DSOF 91. In response to the incident and response by AFI, the kennel implemented procedures to not mix day care dogs with boarding dogs, and further, to limit the amount of animals in the facility at any given time. (Doc. 89-9).

DSOF 92. It was also cited for a severity 5 violation of K.A.R. 9-18-19 in that the employees failed to evaluate the animal's behaviors before co-mingling them, or adequately supervising the dogs in the play area. (Doc. 89-9).

DSOF 93. On March 31, 2023, Inspector Demel conducted a routine inspection at a boarding or training kennel in which three incompatible dogs were stored together and actually began fighting during the inspection. (Doc. 89-10).

DSOF 94. On June 28, 2023, Inspector Washee conducted an inspection pursuant to a complaint of high temperatures inside of a boarding and training kennel. The complaint was founded, in that Washee observed the temperature to be 90 degrees indoors. (Doc. 89-11). The owner of the kennel reported to Washee that, within four hours, the temperature would likely not get lower than 88 degrees. (Doc. 89-11).

DSOF 95. The kennel was ordered to correct the temperature issue within two days. (Doc. 89-11).

DSOF 96. On September 6, 2023, Inspector Demel conducted a routine inspection of a boarding or training kennel. He noted a handful of violations related to cleaning, sanitation, and pest control, as well as housekeeping issues. (Doc. 89-12).

DSOF 97. Importantly, although it was not a technical violation at the time of the inspection, Demel also noted that there was the potential for heating/cooling issues in the area where dogs are placed for timeouts, so that the facility owner could take steps to prevent a situation where animals were housed in extreme temperatures. (Doc. 89-12).

DSOF 98. On September 7, 2023, Inspector Lancaster conducted an inspection of a boarding or training kennel in response to a complaint. The complaint asserted that a dog had been diagnosed with heat stroke upon leaving the facility. (Doc. 89-13).

DSOF 99. The inspector found that a dog had been left outside, without water, for an hour-and-a-half in 100 degree weather. (Doc. 89-13).

DSOF 100. Relatedly, the inspector also found that the kennel did not have enough employees to adequately monitor and intervene with animals as needed. (Doc. 89-13).

DSOF 101. On September 28, 2023, Inspector Lancaster conducted an inspection of a boarding or training kennel in response to a complaint of overcrowding. (Doc. 89-14).

DSOF 102. Inspector Lancaster observed feces in a play yard, and the licensee reported that they never clean that specific area. (Doc. 89-14).

DSOF 103. Inspector Lancaster also noted that sexually intact adult animals, of different sexes, were housed together in violation of K.A.R. 9-18-16. (Doc. 89-14).

DSOF 104. He further observed a cockroach, and noted that the licensee's pest control and/or sanitation practices were insufficient to ensure the health, safety, and welfare of animals due to the risk of disease spread via cockroaches. (Doc. 89-14).

DSOF 105. On July 9, 2024, Inspector Demel conducted a routine inspection of a boarding or training kennel in southwest Kansas. (Doc. 89-15).

DSOF 106. During the inspection, Demel found:

a. Food improperly stored in open containers;

b. Overgrowth of weeds or vegetation in the area;

c. Exposed rust and sharp edges in numerous areas;

d. Dried animal feces in five separate kennels;

e. A buildup of leaves, grass, hair, and dirt, in various kennels;

f. A large amount of mice feces throughout the kennels;

g. A large amount of cob webs on top of the kennels;

h. Used water and food dishes that had not been cleaned in a week and

i. The kennel did not have a current veterinary care form on file.

(Doc. 89-15).

DSOF 107. In September 2024, in response to a complaint, Inspector Lancaster found that a Kennel had been improperly boarding an incompatible dog, "Diesel," that had a history of attacking and biting employees and other dogs. (Doc. 89-16).

DSOF 108. It was also found that this kennel did not have employees adequately trained to manage aggressive dogs and had improper ventilation. (Doc. 89-16).

DSOF 109. These examples of the types of violations that inspectors see are not a comprehensive list. From January 2018 through August 2024, there were approximately 62 failed inspections amongst boarding or training kennels. (Doc 89-17).

LEGAL STANDARD

Summary judgment is appropriate if the moving party demonstrates that "no genuine dispute [about] any material fact" exists and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the movant meets its initial burden, the non-moving party "may not rest upon its pleadings, but must bring forward specific facts showing a genuine issue for trial [on] those dispositive matters for which it carries the burden of proof." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (internal quotation marks and citations omitted). To survive summary judgment, the non-moving party's "evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)(citing *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999)).

The standard is same where, as here, the parties have filed cross motions for summary judgment. *Tahchawwickah v. Brennon*, 2024 U.S. Dist. LEXIS 216064, at *6-7 (D. Kan. Nov. 27, 2024). "Each motion is considered separately, and each party retains the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law." *Id.* (internal quotation marks and citations omitted).

ARGUMENT AND AUTHORITY

I. The location of Plaintiffs' facility is irrelevant to the legal question before the Court.

In setting forth the standard governing this case, Plaintiffs suggest that Defendant's burden is somehow heightened by virtue of the fact that Plaintiffs operate their kennel from their homestead. (Doc. 87, p. 28). This argument has already been rejected by the Tenth Circuit in this case. *Johnson v. Smith*, 104 F.4th 153, n. 1 (10th Cir. 2024); *see also United States v. Cerri*, 753 F.2d 61, 64 (7th Cir. 1985) ("When used as a place of business, the home has the same status under the Fourth Amendment as any other place of business.").

In rejecting that argument, the Tenth Circuit has provided the proper standard under which this case should be analyzed. Having defined the sub-industry as boarding or training kennels, as defined in the Pet Animal Act, the Tenth Circuit laid out the relevant standard for the analysis of the inspections at issue, citing *New York v. Burger*, 482 U.S. 691 (1987), and its progeny.

> Warrantless inspections of certain businesses or industries are constitutionally permissible when the regulatory regime authorizing the inspections passes a two-part test. First, the business or industry to be inspected must be closely regulated. Then, the regime must satisfy three additional criteria (generally referred to as the Burger criteria) for warrantless inspections to be reasonable under the Fourth Amendment: (1) There must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

104 F.4th at 159 (citation cleaned up). Applied here, those factors weigh in favor of Defendant, and thus, Plaintiffs' motion for summary judgment should be denied.

II. Boarding and training kennels are closely regulated.

The relevant factors for determining whether an industry is closely regulated "are the history of warrantless inspections in the industry, the extensiveness and intrusiveness of the regulatory scheme, whether other jurisdictions impose similar regulatory schemes, and whether the industry would pose a threat to the public welfare if left unregulated." *Id.* at 166 (internal quotation marks and citations omitted).

A. History of warrantless inspections.

Plaintiffs argue that "whether the industry was subjected to warrantless searches near the time of the Founding" is of "particular importance." (Doc. 87). But that broad assertion is not found anywhere in the caselaw. The Tenth Circuit said nothing of the Founding on appeal in this case. *See generally* 104 F.4th 153. And numerous industries that were not subjected to warrantless searches at the time of founding have been found, or assumed, to have been closely regulated. *E.g.*, *Club Madonna Inc.*

v. City of Miami Beach, 42 F.4th 1231, 1249 (11th Cir. 2022) (nude dancing and adult entertainment);) *S&S Pawn Shop Inc. v. City of Del. City*, 947 F.2d 432, 437 (10th Cir. 1991) (pawn shops); *United States v. Chuang*, 897 F.2d 646, 651 (2d Cir. 1990) (banking); *Rush v. Obledo*, 756 F.2d 713, 723 (9th Cir. 1985) (daycares); *Stogner v. Kentucky*, 638 F. Supp. 1, 3 (W.D. Kent. 1985) (barbershops). That said, in taking care of other people's dogs, boarding or training kennel operators take on the responsibility of protecting against animal abuse and neglect, the prohibition of which "has a long history in American law, starting with the early settlement of the Colonies." *United States v. Stevens*, 559 U.S. 460, 469 (2010).

In any event, the Tenth Circuit has already spoken on this factor, in this case. The Tenth Circuit noted that "[t]he 33 (now 34) years that boarding or training kennels have been subject to warrantless searches is not entitled to particular weight." *Id.* at 170. Notably, the Tenth Circuit did not observe that Kansas' three-decade history of warrantless searches was entitled to no weight; and it certainly did not determine that those three decades weighed in Plaintiff's favor. Rather, it elected not to assign "particular weight" to those three decades.

More importantly, this observation a was made at the motion to dismiss stage, based only on the four corners of Plaintiff's Complaint. But the Tenth Circuit noted that history of warrantless searches "is less important with a 'new or emerging' industry," and went on to observe that "nothing in the complaint provides reason to think that the boarding-or-training-kennel industry was [] new or emerging in 1991." *Id.* at 170.

Dr. Thomason, with her 17 years of experience in private practice, and in her three years as AFI Director, has observed first-hand that boarding or training kennels are emerging in both number and importance. The number of boarding or training kennels in Kansas has steadily increased during Dr. Thomason's tenure. Further as Dr. Thomason has observed a "huge change" in how people value and treat their animals, with people equating their pets with their children and there being an increased

demand for private boarding kennels. People now seek out licensed boarding or training facilities to ensure their animal's comfort and safety. Boarding and training kennels are a growing industry and is one in which pet owners are increasingly interested. Given this context, this first factor supports a finding that boarding or training kennels are closely regulated.

B. The extensiveness and intrusiveness of the regulatory scheme.

The second factor in determining whether an industry is closely regulated looks at the extensiveness and intrusiveness of the regulatory scheme. *Johnson*, 104 F.4th at 166. Notably, this factor is not addressed in Plaintiffs' motion; rather, Plaintiffs move immediately to the third factor: whether other jurisdictions have imposed similar regimes. (Doc. 87, p. 31). Presumably, this is because the Tenth Circuit has already looked at the extensiveness of the Pet Animal Act and the regulations found in Section 9, Article 18 of the Kansas Administrative Regulations, and found they are "narrowly directed at a limited number of businesses, which tends to weigh in favor of finding that the industry is closely regulated." *Id.* at 170. As the Tenth Circuit has already determined, and as set forth in Defendant's motion for summary judgment, this factor weighs in favor of a finding that boarding or training kennels are closely or pervasively regulated. *Id.*

C. Whether other jurisdictions impose similar regulatory schemes.

Defendant concedes that having defined boarding and training kennels as its own sub-industry, the Tenth Circuit determined that this factor did not weigh in favor of a finding that boarding or training kennels are closely regulated. *Johnson*, 104 F.4th at 171-173. But Defendant would simply note that Kansas is not the only state, or even one of a handful of states, with a similar regulatory scheme. Nine other states also allow for the inspection of boarding and training kennels. And so, although the law of the case may dictate that this factor weighs in Plaintiff's favor, it does not do so overwhelmingly.

D. The public welfare.

In addressing this factor, Plaintiffs focus primarily on their argument that boarding or training kennels are not inherently dangerous. Defendant concedes that point. But inherent danger is not an absolute prerequisite to finding that a business is closely or pervasively regulated. *Mexican Gulf Fishing Co. v. United States DOC*, 60 F.4th 956, 967-68 (5th Cir. 2023). It is enough if "the industry would pose a threat to the public welfare if left unregulated." *Id.* at 166 (quoting *Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019)). This is consistent with the caselaw.

> [L]ower federal courts have recognized a number of additional industries as being closely regulated, including pharmaceuticals, the medical profession, food, nuclear power, storing and dispensing gasoline, construction, day care centers, nursing homes, asbestos removal, solid waste disposal, credit unions, pawnshops, banking, insurance, commercial trucking, purchase of precious metals and gems, casinos, adult entertainment stores, and massage parlors.

Club Madonna, 42 F.4th at 1248 (citing *Rethinking Closely Regulated Industries*, 129 Harv. L. Rev. 805-06 (2016)); *see also Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 282-83 (6th Cir. 2018) (precious metal dealers); *Heffner v. Murphy*, 745 F.3d 56, 67 (3d Cir. 2014) (funeral homes); *United Taxidermists Ass'n v. Ill. Dep't of Nat. Res.*, 436 F. App'x 692, 693 (7th Cir. 2011) (taxidermists); *S&S Pawn Shop Inc. v.*, 947 F.2d at 437 (pawn shops); *Chuang*, 897 F.2d at 651 (banking); *Rush*, 756 F.2d at 23; *Stogner*, 638 F. Supp. at 3 (barbershops). And so, the question is not whether boarding or training kennels are inherently dangerous; the question is whether there is a risk to the public welfare if the industry is left unregulated.

Numerous courts have recognized, or at least assumed, a public interest in animal safety and animal welfare. *United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *see also Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 866 (10th Cir. 2016) (neither party contesting that exotic animal industry was closely regulated); *Lesser v. Espy*, 34 F.3d 1301, 1306-08 (7th Cir. 1994) (rabbitries closely regulated); *Serpas v. Schmidt*, 827 F.2d 23, 28 (7th Cir. 1987) ("We have no doubt that

horse racing is and ought to be pervasively regulated."); *Prof'l Dog Breeders Advis. Council v. Wolff*, 2009 U.S. Dist. LEXIS 83054, at *25-26 (M.D. Penn. Sept. 11, 2009) (dog breeding closely regulated); *State v. Warren*, 2019 MT 49, 395 Mont. 15, 439 P.3d 357, ¶ 25 (2019) (dog breeding closely regulated); *Arnett v. Denton*, 2013 U.S. Dist. LEXIS 207186, at *19 (W.D. Tex. Feb. 15, 2013) ("There is certainly a substantial government interest served by the random inspections, as the protection and welfare of animals is served by field inspectors conducting random visits to breeding facilities to ensure licensed breeders are meeting minimum standards of care."); *State v. Marshall*, 821 S.W.2d 550, 551-52 (Mo. App. 1991) (noting that animal abuse statutes are "public welfare" statutes, through which "[t]he evil sought to be avoided is neglect of an animal whose care has been assumed by the person having ownership or custody of it."). This public interest is memorialized in Kansas' statutory law; K.S.A. 21-6411, *et. seq.*, which can be found in Article 64, Crimes Against the Public Morals, of the Kansas Criminal Code, criminalizes specific situations that the Pet Animal Act, with its inspection scheme, seeks to prohibit. *See* K.S.A. 21-6412(a)(3),(5).

Unregulated boarding and training kennels, that are not subject to routine inspections and standards, carry significant risks including dehydration, malnourishment, or other animal abuse or neglect. Dogs that live in the house—which one would most expect to see at a boarding kennel—are most susceptible to harm as a result of extreme temperatures. And because boarding and training kennels involve dogs mingling with other strange dogs, there is an increased risk of animal fights, accidental breeding, or the spread of disease. Additionally, violations of food or sanitation regulations can lead to an increase and sickness and disease in the dogs.

Routine inspections regularly catch, but more often prevent, these issues. Dr. Thomason, Demel, and Washee all testified about the importance of the inspections in ensuring compliance and educating licensees on compliance with the Pet Animal Act. If boarding or training kennels were left

unregulated, there would be increased risk of animal neglect, animal abuse, animal injury, and the spread of disease to pets and their owners alike, which would be harmful to the public welfare.

III. The *Burger* factors.

Because boarding or training kennels are a closely regulated industry, the next question is whether the inspection scheme satisfies the *Burger* criteria. To pass muster, (1) the scheme must be informed by a substantial government interest; (2) warrantless inspections must be necessary to further the regulatory scheme; (3) and the warrantless regime must provide a constitutionally adequate substitute for a warrant. *Johnson*, 104 F.4th at 174.

A. Defendant's inspections are informed by a substantial government interest.

Citing *Donovan v. Dewey*, 452 U.S. 594 (1980), Plaintiffs suggest that this factor cannot be met unless the legislation at issue was preceded by an investigation into the industry. But the caselaw and precedent place no such extra-legislative burden on a state in supporting its governmental interest. The Tenth Circuit certainly did not impose such a requirement; all that is required is "factual support for the proposition that regulating boarding or training kennels would advance animal welfare.". *Johnson*, 104 F.4th at 175. On the contrary, there is no need to look to legislative history, when one can look at the legislation itself.

> It is presumed the legislature understood the meaning of the words it used and intended to use them and that the legislature used the words in their ordinary and common meaning. Legislative intent must be determined from a general consideration of the entire act and not from an isolated part thereof.

Cease v. Safelite Glass Corp., 927 F. Supp. 1452, 1455 (D. Kan. 1996) (internal quotation marks and citations omitted); *Jarvis v. Kansas Dep't of Revenue*, 312 Kan. 156, 165 (2020) ("[C]ourts construing statutes presume the Legislature does not intend to enact meaningless legislation.").

Defendant has a legitimate government interest in preventing and deterring animal abuse and neglect in boarding or training kennels. Various courts have recognized the legitimacy of this long-

standing governmental interest. *Stevens*, 559 U.S. at 469; *Benigni v. Mass*, 1993 U.S. App. LEXIS 31629, at *6-7 (8th Cir. Dec. 8, 1993); *Hodgins v. United States Dep't of Ag.*, 2000 U.S. App. LEXIS 29892, at *15-16 (6th Cir. Nov. 20, 2000). *Prof'l Dog Breeders Advis. Council*, 2009 U.S. Dist. LEXIS 83054, at *25-28; *Marshall*, 821 S.W.2d at 551-52.

This interest is no less substantial in this case. The standards set forth in the Pet Animal Act and its implementing regulations are in place to prevent serious issues such as heat stroke, animal dehydration, animal attacks resulting in injury or death, animal neglect, unauthorized breeding, and the spread of disease not only amongst animals, but from animals to humans. The same substantial government interest that applies to breeders, horse racing, and other animal-based industries apply no less to boarding or training kennels. In 1990, this Court found that the Pet Animal Act serves a legitimate purpose of advancing "quality control and humane treatment of animals." *Kerr v. Kimmell*, 740 F. Supp. 1525, 1529 (D. Kan. 1990). That remains true today. There can be inhumane treatment of animals in boarding or training kennels, too. Dogs can die at boarding or training kennels. Dogs can be left unattended at boarding or training kennels. Dogs can be left without water, or out in extreme conditions at boarding or training kennels.

Plaintiffs' assertion that boarding or training kennels should be exempted from inspections because licensees are accountable to pet owners, is unavailing. Plaintiffs' facility is not open to the public, and these owners that purportedly hold Plaintiffs accountable, are not even allowed to freely visit the property. (PSOFs 8, 11, 240). But even if it were true that Plaintiffs' customers hold him accountable, Defendant's inspection regime applies more broadly than just to Plaintiffs.

Plaintiffs may be perfect licensees; but to paraphrase Publius: "if [all licensees] were [Plaintiffs], no [Pet Animal Act] would be necessary." The Federalist, No. 51 (James Madison). Not all licensees are as scrupulous as Plaintiffs. There were at least 62 failed inspections of boarding or training kennels

from January 2018 through August 2024. And one only needs to look at the number of complaints that Defendant responds to see that pet owners are not a substitute for regulation; rather, pet owners rely on regulation when boarding or training their pets. Pet owners feel comfortable taking their dogs to licensed boarding or training facilities because those facilities are subject to regulation and inspections. When an owner suspects mistreatment of his or her dog, he files a complaint with Defendant who, in turn, addresses the complaint via an unannounced, warrantless inspection.

Finally, the fact that boarding or training kennels are taking care of other people's dogs only enhances the government's substantial interest. Because dogs come and go from boarding or training kennels, only to return to their families, the risk of the spread of disease is higher in such kennels. Spoiled food or mice droppings can be the first step in a disease that travels from a pet to its owner, then to the owner's children, then to the children's school, and so on and so forth. Because boarding or training kennels take care of other people's property, the government has a significant interest in licensing these kennels. This is true for two reasons: first, members of the public rely on the fact that boarding and training kennels are subject to governmental regulation, standards, and inspections when they entrust their pet to such a kennel; second, the government has an interest in ensuring that these licensed agencies are responsible stewards of other people's pets which, again, many people treat almost like children. *C.f. Rush*, 756 F.2d at 723 (recognizing constitutionality of warrantless inspections of daycares).

B. Warrantless inspections are necessary to further the regulatory scheme.

Plaintiffs' arguments on this factor operate entirely under the premise that the purpose of inspections under the Pet Animal Act is to catch and punish violations. But that is not the case. Dr. Thomason, the AFI Program Director, testified that compliance and prevention of violations was the primary purpose of the inspection regime. Demel and Washee agreed. They all testified that an element

of surprise was necessary. Dr. Thomason noted that surprise is important to keep licensees "on their toes," and that a licensee's compliance may be temporary, and timed around a routine inspection, if he had notice. Similarly, Demel noted that unannounced inspections help not only in catching violations, but also in seeing small issues, and intervening, before the violations become a big issue that can cause real harm. Washee echoed the sentiment, noting that the warrantless searches ensure that a licensee is more likely to be complying at all times, "whether or not they know [she's] coming to do the inspection."

"[W]arrantless searches are necessary if a warrant requirement could significantly frustrate effective enforcement of the Act." *Liberty Coins*, 880 F.3d at 285. But Defendant "need not show that warrantless searches are the most necessary way to advance its regulatory interest." *Heffner*, 745 F.3d at 68. Where, as here, prevention and deterrence are a key governmental interest, Courts have recognized the necessity of surprise inspections.

> According to the Plaintiffs, inspectors' searches of funeral establishments are likely to focus on compliance with such regulations as building standards, and the need for surprise inspections is therefore attenuated to such an extent that it cannot justify a warrantless intrusion under Burger. Although that may be true, it is neither outcome determinative nor does it advance our inquiry. Although the need for unannounced inspections of funeral parlors may not be as great as for other kinds of businesses, that does not negate the need for surprise inspections of funeral parlors. The Board need not show that warrantless searches are the most necessary way to advance its regulatory interest.
>
> The Board persuasively explains that **if inspectors are barred from entering funeral homes without a search warrant or advance notice, unscrupulous funeral practitioners could bring their establishments into regulatory compliance prior to an inspection, only to let them fall below prescribed standards when the threat of detection passes. We agree.** Thus, Pennsylvania's warrantless search regime is not qualitatively different from various other administrative inspection schemes that depend on the element of surprise to both detect and deter violations.

Heffner, 745 F.3d at 67-68 (internal quotation marks and citations omitted) (emphasis added); *see also Benigni*, 1993 U.S. App. LEXIS 31629 at *6-7. Ensuring compliance, or put another way, "serv[ing] as

a credible deterrent" is a justification for warrantless inspections. *Burger*, 482 U.S. 710 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)). And the seeking of a criminal or administrative warrant, which can only be issued after there is probable cause to believe that a violation has already occurred, would seriously frustrate that goal. A warrant would only be sought once there was probable cause to believe a licensee was not in compliance. And so, by the time the warrant was sought, easily concealed violations would be fixed and the neglect or abuse sought to be prevented would have already happened. The primary purpose of the regime—prevention and compliance—would have been frustrated.

But even if Defendant was only interested in catching violations, an element of surprise would still be essential. In considering this factor, whether violations are easy to conceal is a key factor in determining whether warrantless searches are necessary to further a regime. *Donavan*, 452 U.S. at 603; *Hopkins Cty. Coal, LLC v. Acosta*, 875 F.3d 279, 293-94 (6th Cir. 2017). Plaintiffs' allegations about the detection of violations no longer carry the day at the summary judgment stage. As Demel testified, there are numerous, serious violations that are easy to quickly conceal or remedy.

Some of those violations are serious even in a single occurrence: one instance of animal separation can lead to animal death, the spread of disease, or unauthorized breeding. Similarly, violations of watering and/or temperature regulations can result in dehydration and heat stroke, like the dog that suffered heat stroke after only an hour-and-a-half at a kennel. As Dr. Thomason notes, it can take as little as 30 minutes for a dog to succumb to life-threatening hypothermia or heat stroke, and indoor dogs are much more susceptible to such an incident. Other easily concealable violations may seem minor, but can cause problems over time, such as those related to bedding and both the storage and provision of food and water would also be easy to remedy with prior notice. Those regulations are in place to prevent the spread of disease or vermin infestations amongst the dogs, and

violations of those regulations are also easy to quickly conceal. Defendant would much rather prevent mice infestations or spoiled food at a kennel than later discover the inhumane fruits of infestations or food spoilation that are "significant or chronic."

And contrary to the Tenth Circuit's determination based solely on Plaintiffs' allegations, in many circumstances, there would be no way of knowing about those violations if they were simply concealed by a licensee who was given notice of an inspection simply by looking at the dogs at the facility. It may be true for licensees like Plaintiffs—who keep dogs for a long period of time—that evidence of malnourishment or abuse would eventually become detectable in dogs that had been subjected to significant and chronic maltreatment. But not all boarding or training kennels keep the same dogs for extended periods of time. On the contrary, many—if not most—boarding or training kennels are more akin to doggie daycares at which pet owners leave their dog for a day, or several days, at a time. And so, violations, even if significant and chronic, may not be readily apparent. The dog that was dehydrated yesterday may be gone, while the dog in front of the inspector might just be starting to get thirsty. As the Sixth Circuit has observed, warrantless inspections are necessary "if the search objects are likely to change hands quickly." *Liberty Coins*, 880 F.3d at 285; *see also Burger*, 482 U.S. at 710 ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them.").

For these reasons, the warrantless searches are necessary to further Defendant's substantial governmental interests.

C. The inspection program provides a constitutionally adequate substitute for a warrant.

Plaintiffs spend little time on the third *Burger* factor, presumably because the Tenth Circuit has already analyzed this factor persuasively. *Johnson*, 104 F.4th at n. 7 This factor looks at the government's inspection program "in terms of the certainty and regularity of its application." *Burger*, 482 U.S. at 703.

The regime "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the of the inspecting officers." *Id.* This factor is met if the regulations are "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.*

Both the Pet Animal Act and applications for a boarding or training kennel license put licensees on notice of the inspection procedures. Licensees are advised that the search is being made pursuant to law, and the searches have a well-defined scope, as articulated in the Pet Animal Act and its implementing regulations. Routine inspections are conducted every 15 to 24 months if the premises passed its three most recent inspections; every 9 to 18 months if it passed its two most recent inspections; and every 3 to 12 months if it failed either of its two most recent inspections. K.A.R. § 9-18-9(b). The only other inspections allowed are re-inspections after a failed inspection, inspections pursuant to a complaint, inspections when ownership has changed, or inspections where the license was not timely-renewed. K.A.R. § 9-18-9(c). Inspections may take place only Monday through Friday between 7:00 a.m. and 7:00 p.m., *see id.* § 9-18-9(d), and licensees may specify their preferred times for inspection. The regulations also define the scope of searches. Inspectors are authorized to enter the place of business, examine and make copies of required records, inspect premises and dogs as necessary to enforce the Act and its regulations, document conditions and areas of noncompliance, and use a room, table, or other facilities necessary for the examination of the records and inspection.

A regime will not satisfy this third *Burger* criteria only if the searches are "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Liberty Coins*, 880 F.3d at 286 (internal quotation marks and citations omitted). It cannot seriously be argued that the Pet Animal

Act allows for random, infrequent, or unpredictable searches, especially when compared to other regimes that have passed constitutional muster. For example, in *Dewey*, the Supreme Court approved a regime that allowed for searches of surface mines "at least twice annually" and of all underground mines "at least four times annually." *Dewey*, 452 U.S. at 604. Furthermore, like the Pet Animal Act, the regime in *Dewey* also mandated routine follow-up searches when violations were found. *Id; see also Burger*, 482 U.S. 694 n.1, 711 (allowing for inspections on a "regular basis," and only "during [] regular and usual business hours."). The regulatory framework is comprehensive, predictable, and provides a constitutionally adequate substitute for a warrant.

IV. The *Jones-Jardines* standard does not apply here.

Plaintiffs re-assert an argument that the Tenth Circuit has already rejected. They ask the Court to analyze their claims under the *Jones-Jardines* standard—which utilizes a property-based analysis—rather than the *Burger* standard that the Tenth Circuit has already applied in this case. As the Tenth Circuit noted:

> [C]ases invoking the closely-regulated-industry exception have never suggested that the inspections at issue were not searches. They have simply held that the searches are reasonable in part because of the lesser reasonable expectation of privacy in that context. In any event, and more importantly, *Patel* gave no hint of a revised approach to regulatory inspections resulting from the Court's recent Fourth Amendment trespass jurisprudence.

Johnson, 104 F.4th at 167. That remains true today. The Tenth Circuit has already established the standard that applies to this case; there is no need to deviate from that standard now.

V. Because Defendant's inspections are reasonable under *Burger*, Plaintiffs' unconstitutional conditions doctrine claim must fail.

Plaintiffs also claim that Defendant's inspection regime imposes unconstitutional conditions on them. Under the unconstitutional conditions doctrine, "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government

where the benefit sought has little or no relationship to the property." *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011) (citation omitted). The doctrine applies only if a constitutional right is implicated. "[I]f no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained." *Id.* at 1277 (citation omitted).

As set forth above, boarding or training kennels is a closely regulated industry, and the Pet Animal Act's inspection regime satisfies the *Burger* criteria. And so, because Plaintiffs' Fourth Amendment rights have not been violated, Plaintiffs' unconstitutional conditions doctrine must be dismissed.

CONCLUSION

For the forgoing reasons, the Plaintiffs' Motion for Summary Judgment should be denied.

WATKINS CALCARA, CHTD.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 21st day of March 2025, the above and foregoing Response to Plaintiff's Motion for Summary Judgment was filed with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to registered counsel.

/s/ JEFFREY M. KUHLMAN
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